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Nos. 80-883, 80-848

IN THE

Supreme Court of the United States

October Term, 1980.

PIPER AIRCRAFT COMPANY,

Petitioner,

vs.

GAYNELL REYNO,

Respondent.

HARTZELL PROPELLER, INC.,

Petitioner,

vs.

GAYNELL REYNO,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT GAYNELL REYNO.

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Questions Presented.

Whether, in an action in Federal District Court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied if the case were litigated in the District Court is more favorable to them than the law that would be applied by the courts of their own nation. [No. 80-848 (Piper)].

Whether a motion to dismiss on the ground of forum non conveniens should be denied because the law of the alternative forum is expected to be less favorable to the foreign plaintiff than the law that would be applied by the court deciding the motion. [No. 80-883 (Hartzell)].

Parties Below.

Respondent Gaynell Reyno, appellant in the Third Circuit Court of Appeals, brought suit as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott. The petitioners were the defendants and appellees below. The petitioner Hartzell Propeller, Inc., an Ohio corporation, is affiliated only with its subsidiary Piqua Aircraft Company; Petitioner Piper Aircraft Company, a Pennsylvania corporation, is a subsidiary of Bangor Punta Corporation. Although petitions for certiorari were filed separately by each Petitioner, the cases have been consolidated for purposes of argument before this Court.

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BRIEF FOR RESPONDENT GAYNELL REYNO.

Statement of the Case.

On July 27, 1976, a small, commercial chartered aircraft went down in the Scottish highlands near Moffat, on a flight from Blackpool to Perth. (JA 18, 66, 95-96).[1] All six persons aboard the aircraft were killed. (JA 66).

The plane, a Piper Aztec, was owned by a Scottish air taxi service, and the five passengers and single pilot were Scottish. (JA 118). There were no witnesses to the crash,

[1]Citations denoted by JA are to the Consolidated Joint Appendix.

but there were indications that the left engine malfunctioned (JA 25; JA 118), although the case has not proceeded far enough on a factual basis to determine the exact nature of the cause of the crash. (JA 48).

Respondent Gaynell Reyno, acting as personal representative of the estates of the five passenger decedents, first instituted this action in the Superior Court of the State of California for the County of Los Angeles in July, 1977. (JA 68; JA 118-119). The bases for respondent's complaint for wrongful death were strict liability and negligence. (JA 119). Plaintiff contended that the malfunction of the left engine was the result of a design or manufacturing defect, and that there were several dangerous and defective conditions in the aircraft itself, including inadequacies associated with the left propeller mechanism and with the instrumentation. (JA 119).

On motion by Piper and another defendant, (Avco), later dismissed from the case by stipulation, the matter was removed from the California state court to the Federal District Court in California. Subsequently, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania, pursuant to 28 U.S.C. §1404(a). Piper then joined in this motion and moved to dismiss, alternatively, for failure to state a cause of action, and to strike the claim for punitive damages. (JA 119). In the course of these motions, both defendants strenuously, ardently and successfully argued that the traditional determinative factors embodied in the statute and in case law mandated that the action be transferred to the District Court in Pennsylvania. (JA 44-47). The District Court agreed that it did not have personal jurisdiction over Hartzell, granted the motion to quash service of process, and transferred the entire matter to the Middle

District of Pennsylvania under 28 U.S.C. §1404(a). (JA 119-120).

Soon after the transfer, both defendants brought motions to dismiss the case on the ground of forum non conveniens, contending that the matter should be heard in Scotland. (JA67). Again, the defendants offered strenuous argument in favor of another forum, this time Scotland rather than Pennsylvania. (JA 29-42).

On October 19, 1979, the District Court, R. Dixon Herman, United States District Judge, ordered that the action "be dismissed on the conditions that Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts." (JA 88).

The Court of Appeals reversed, concluding that the defendants did not meet the burden required of them for a forum non conveniens dismissal. (JA 156). The Court's first point was that the defendants had attempted to "trifle" with the judicial process by initially arguing that Pennsylvania was the proper forum and then averring the same with respect to Scotland. In this regard, the Court relied on a decision of the Court of Appeals for the Fifth Circuit (JA 121),[2] and added that a history of a successful §1404(a) transfer prior to a forum non conveniens motion ought to add to the burden already imposed on the moving party. (JA 124).

The Court then went on to discuss comparative burdens, trial court discretion and the standard of review to which it was bound.

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[2] *Insurance Co. of North America v. Ozean/Stinnes-Linien*, 367 F.2d 224, 227 (5th Cir. 1966) (quoting *Livesay Ind. v. Livesay Window Co.*, 202 F.2d 378, 382 (5th Cir. 1953), cert. denied, 346 U.S. 855 (1953)).

Addressing first the plaintiff's choice of a forum, the Court cited the well known rule that the plaintiff's choice of a forum should rarely be disturbed, and that the nationality of the plaintiff, according to opinions of the Third Circuit and of the Supreme Court, carries little weight toward diminishing the significance of that choice (JA 129), or affecting the burden of the defendant. (JA 130). The Court also pointed out the significance in this instance of the plaintiff already having ceded the "home court advantage", stating that "[i]t would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground". (JA 130).

The Court then made clear the applicable standard of review. It stated that abuse of discretion was the sole standard, but that such an abuse of discretion was readily demonstrated if the trial court did not hold a defendant to its proper burden, or had clearly erred in weighing the factors to be considered. It held that the "district court's wide discretion may not serve the defendants as a burden-shifting device on appeal from an order in their favor." (JA 131)

The Court then went on to weigh individually the factors involved in the determination of a motion on forum non conveniens grounds.

With respect to the convenience of witnesses, the Court held that the defendants had not met with requisite specificity the requirement that they set forth the key witnesses to be called and the essence of their testimony. (JA 133). The Court then concluded that the district court was, at the very least, without sufficient information to adequately weigh this factor, and that its conclusion that this particular factor favored the defendants was without foundation. (JA 134).

With respect to the availability of compulsory process and impleader, the Court noted that defendants contended that their inability to join the Scottish parties as defendants would be unfair and unduly burdensome. However, the Court, after reasoning the question, stated that "[i]f the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside". (JA 135-136). The Court then concluded that although the defendants' inability to join other potentially liable parties might make litigation in Pennsylvania more burdensome, the defendants had failed to demonstrate the inherent unfairness of such a circumstance. The Court noted that although this factor did indeed weigh in favor of the defendants, it was not greatly determinative. (JA 137).

The Court then dealt swiftly with the factor concerning viewing the premises, stating that any benefit in such a viewing was doubtful. (JA 137).

Going on to the public interest factors, the Court embarked on a lengthy and comprehensive discussion concerning choice of law. (JA 140-156). Prior to such discussion, however, the Court considered briefly whether foreign law should be applied. The Court stated that Scotland would in all probability apply its own law to all claims, rather than struggle with a mixture of American and Scottish law. (JA 139). The Court then went on to quickly reiterate the as yet unassailed holding of *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978),

that a dismissal for forum non conveniens should not result in a change in the applicable law. (JA 140).[3]

The Court's discussion with respect to choice of applicable law was thorough. However, because the issues discerned and conclusions reached are not presently before this Court, an analysis thereof need not be set forth here.

The Court then went on to instruct that the district court must proceed to determine the capacity to sue of plaintiff Reyno, allowing that an attack on her capacity at this stage of the proceedings may be too late. (JA 150-151).

Finally, the Court stated that since applicable choice of law rules lead to the recognition that Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute, other public interest factors under *Gilbert* favor trial in the United States. (JA 156).

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[3]The language in *DeMateos* in this regard is as follows: "However, in considering the propriety of a venue transfer pursuant to 28 U.S.C. §1404(a), the Court has emphasized that such a transfer should not, despite its convenience, result in a change in the applicable law. *Van Dusen v. Barrack*, 376 U.S. 612, 626-43, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). That principle is no less applicable to a dismissal on forum non conveniens grounds."

This bit of dictum in the Court of Appeals opinion in *Reyno* was seized upon by Petitioners and made the basis for their argument before this Court. Said dictum was mischaracterized by Piper as "decisive", "startling", etc. (Brief on the merits for Piper, pp. 8, 25, 27, 39), and by Hartzell as "dispositive" and "controlling". (Brief on the merits for Hartzell, pp. 4, 13, 18, 27). To accord such dispositive weight to this brief mention and affirmation of the holding in *DeMateos* is to radically misinterpret the Third Circuit's decision. That decision was based upon choice of law, and only as dictum made mention of the holding in *DeMateos*, which to date remains unchallenged. See *Melville v. American Home Assur. Co.*, 443 F.Supp. 1064, n. 51 (E.D. Pa. 1977), which held *Van Dusen* inapplicable to the situation then extant, but left untouched the principle established in *DeMateos*. The principle announced in *DeMateos* was a natural outgrowth of the holding in *Van Dusen v. Barrack, supra*, but was nonetheless set forth independently of the rule therein, which concerned interdistrict transfers pursuant to 28 U.S.C. §1404(a).

In conclusion, the Court held that defendants had not met the burden required of them for a forum non conveniens dismissal; therefore, the judgment of the district court must be reversed and the cause remanded.

The Petitions for Certiorari followed.

Summary of Argument.

I.

Certiorari in this matter was improvidently granted. Because the essence of the Court of Appeals' decision rests on choice of law principles, the question now before this Court is entirely academic. Since this Court has elected not to hear argument on the propriety of the Third Circuit's choice of law analysis, the decision of the Supreme Court should have no effect on the actual rights and liabilities of these particular parties, as determined by the Court of Appeals.

II.

The weight to be accorded the plaintiff's choice of a forum, as instructed by *Gilbert* and its progeny, is considerable. The reasons are many, but beyond all of the irrefutable and uncontradicted arguments in favor of bestowing upon the injured plaintiff the right to seek redress wherever he sees fit, there is a further, highly just and desirable benefit to be derived from according the plaintiff his choice of a forum: The defendant accused of wrongdoing will always be held to the highest available standard of accountability for his actions and resulting injuries and damages. In this way are persons and entities such as the defendant manufacturers now before this Court made aware of the extent to which they may be answerable for a panoply of wrongful acts — in this instance the dissemination of defective prod-

ucts into the worldwide mainstream of commerce and industry.

The public policy to be advanced by this vehicle is obvious. As between a jurisdiction holding manufacturers only to the standard of due care (Scotland), and a jurisdiction holding the same manufacturers to the standard of strict liability (United States), the latter can clearly be seen to better advance a policy of deterrence of wrongful conduct, while at the same time provide the injured plaintiff with the best opportunity for compensatory redress.

Thus, to look at the law of a particular forum only in terms of its "favorability" to the plaintiff is to eclipse the other, highly important half of the same concept, the ability of that forum to insure that the actions of prospective defendants are within the limits of acceptable conduct within the jurisdiction.

III.

One of the threshold instructions in *Gulf Oil Corp. v. Gilbert*,[4] acknowledged as the premier forum non conveniens decision, mandated the existence of an alternative forum before dismissal on that ground could be considered. Inherent in that mandate is the concept that plaintiff must have an adequate remedy and law available to him before another forum can be considered an acceptable alternative.

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[4]330 U.S. 501 (1947).

ARGUMENT.

I.

The Writs of Certiorari in This Matter Were Improvidently Granted.

In many cases before this Court in the past, the decision has been reached that a writ of certiorari should never have been granted, and was so done improvidently.[5]

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[5]*United States v. Rimer* (1911) 220 U.S. 547, 55 L.Ed. 578, 31 S.Ct. 596; *Furness, Withy & Co. v. Yang-Tsze Ins. Asso.* (1917) 242 U.S. 430, 61 L.Ed. 409, 37 S.Ct. 141; *Tyrrell v. District of Columbia* (1917) 243 U.S. 1, 61 L.Ed. 557, 37 S.Ct. 361; *Houston Oil Co. v. Goodrich* (1918) 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140; *Layne & Bowler Corp. v. Western Well Works, Inc.* (1923) 261 U.S. 387, 67 L.Ed. 712, 43 S.Ct. 422; *Southern Power Co. v. North Carolina Public Service Co.* (1924) 263 U.S. 508, 68 L.Ed. 413, 44 S.Ct. 164; *Keller v. Adams-Campbell Co.* (1924) 264 U.S. 314, 68 L.Ed. 705, 44 S.Ct. 356; *Davis v. Currie* (1924) 266 U.S. 182, 69 L.Ed. 234, 45 S.Ct. 88; *Missouri P. R. Co. v. Hanna* (1924) 266 U.S. 184, 69 L.Ed. 235, 45 S.Ct. 36; *Erie R. Co. v. Kirkendall* (1924) 266 U.S. 185, 69 L.Ed. 236, 45 S.Ct. 33; *Mellon v. McKinley* (1927) 275 U.S. 492, 72 L.Ed. 390, 48 S.Ct. 34; *Missouri-Kansas-Texas R. Co. v. Texas* (1927) 275 U.S. 494, 72 L.Ed. 391, 48 S.Ct. 82; *Sutter v. Midland Valley R. Co.* (1929) 280 U.S. 521, 74 L.Ed. 590, 50 S.Ct. 65; *Sanchez v. Gautiery Borras* (1931) 283 U.S. 798, 75 L.Ed. 1421, 51 S.Ct. 490; *Snowden v. Red River & B. D. G. Levee & Drainage Dist.* (1932) 284 U.S. 592, 76 L.Ed. 510, 52 S.Ct. 198; *Texas & N. O. R. Co. v. Neill* (1937) 302 U.S. 645, 82 L.Ed. 501, 58 S.Ct. 118, *reh. den.* 302 U.S. 778, 82 L.Ed. 602, 58 S.Ct. 268; *Aetna Ins. Co. v. Illinois C. R. Co.* (1937) 302 U.S. 652, 82 L.Ed. 505, 58 S.Ct. 269; *Tax Com. of Ohio v. Wilbur* (1938) 304 U.S. 544, 82 L.Ed. 1518, 58 S.Ct. 1036, *reh. den.* 305 U.S. 668, 83 L.Ed. 433, 59 S.Ct. 55; *Goins v. United States* (1939) 306 U.S. 622, 83 L.Ed. 1027, 59 S.Ct. 783; *McCullough v. Kammerer Corp.* (1945) 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297; *McCarthy v. Bruner* (1944) 323 U.S. 673, 89 L.Ed. 547, 65 S.Ct. 126; *Loftus v. Illinois* (1949) 337 U.S. 935, 93 L.Ed. 1741, 69 S.Ct. 1511; *Parker v. County of Los Angeles* (1949) 338 U.S. 327, 94 L.Ed. 144, 70 S.Ct. 161; *Bentsen v. Blackwell* (1954) 347 U.S. 925, 98 L.Ed. 1078, 74 S.Ct. 528; *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 524, 559, 1 L.Ed.2d 493, 515, 77 S.Ct. 443, 459, 478, *reh. den.* 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808; *The Monrosa v. Carbon Black Export, Inc.* (1959) 359 U.S. 180, 3 L.Ed.2d 723, 79 S.Ct. 710, *reh. den.* 359 U.S. 999, 3 L.Ed.2d 986, 79 S.Ct. 1115; *Mitchell v. Oregon Frozen Foods Co.* (1960) 361 U.S. 231, 4 L.Ed.2d 267, 80 S.Ct. 365; *McGann v. United States* (1960) 362 U.S. 214, 4 L.Ed.2d 666, 80 S.Ct. 629; *Phillips v. New York* (1960) 362 U.S. 456, 4 L.Ed.2d 874, 80 S.Ct. 874; *Needleman v. United States* (1960) 362 U.S. 600, 4 L.Ed.2d 980, 80 S.Ct. 960, *reh. den.* 363 U.S. 858, 4 L.Ed.2d 1739,

(footnote continued on following page)

The dismissal of a writ of certiorari as improvidently granted has been ordered for a variety of reasons, all re-

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80 S.Ct. 1606; *Kimbrough v. United States* (1961) 364 U.S. 661, 5 L.Ed.2d 362, 81 S.Ct. 390, *reh. den.* 365 U.S. 825, 5 L.Ed.2d 703, 81 S.Ct. 688; *Bullock v. South Carolina* (1961) 365 U.S. 292, 5 L.Ed.2d 570, 81 S.Ct. 686; *Newsom v. Smyth* (1961) 365 U.S. 604, 5 L.Ed.2d 803, 81 S.Ct. 774; *Smith v. Butler* (1961) 366 U.S. 161, 6 L.Ed.2d 184, 81 S.Ct. 937, *reh. den.* 366 U.S. 941, 6 L.Ed.2d 852, 81 S.Ct. 1657; *Atchley v. California* (1961) 366 U.S. 207, 6 L.Ed.2d 233, 81 S.Ct. 1051; *Baldonado v. California* (1961) 366 U.S. 417, 6 L.Ed.2d 380, 81 S.Ct. 1355; *Hodges v. United States* (1961) 368 U.S. 139, 7 L.Ed.2d 184, 82 S.Ct. 235; *Benz v. New York State Thruway Authority* (1962) 369 U.S. 147, 7 L.Ed.2d 634, 82 S.Ct. 674; *Williams v. Zuckert* (1963) 371 U.S. 531, 9 L.Ed.2d 486, 83 S.Ct. 403, vacated 372 U.S. 765, 10 L.Ed.2d 136, 83 S.Ct. 1102; *Wolf v. Weinstein* (1963) 372 U.S. 633, 10 L.Ed.2d 33, 83 S.Ct. 969, *reh. den.* 373 U.S. 928, 10 L.Ed.2d 427, 83 S.Ct. 1522; *Smith v. Mississippi* (1963) 373 U.S. 238, 10 L.Ed.2d 321, 83 S.Ct. 1265; *Gotthilf v. Sills* (1963) 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187; *Dresner v. Tallahassee* (1964) 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895; *Mishkin v. New York* (1966) 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, *reh. den.* 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440; *Cichos v. Indiana* (1966) 385 U.S. 76, 17 L.Ed.2d 175, 87 S.Ct. 271, *reh. den.* 385 U.S. 1020, 17 L.Ed.2d 559, 87 S.Ct. 699; *Gilbert v. California* (1967) 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951; *Massachusetts v. Painten* (1968) 389 U.S. 560, 19 L.Ed.2d 770, 88 S.Ct. 660; *Johnson v. Massachusetts* (1968) 390 U.S. 511, 20 L.Ed.2d 69, 88 S.Ct. 1155; *Palmieri v. Florida* (1968) 393 U.S. 218, 21 L.Ed.2d 389, 89 S.Ct. 440, *reh. den.* 393 U.S. 1045, 21 L.Ed.2d 596, 89 S.Ct. 611; *Conway v. California Adult Authority* (1969) 396 U.S. 107, 24 L.Ed.2d 295, 90 S.Ct. 312, *reh. den.* 396 U.S. 1030, 24 L.Ed.2d 527, 90 S.Ct. 544; *Jones v. State Board of Education* (1970) 397 U.S. 31, 25 L.Ed.2d 27, 90 S.Ct. 779, *reh. den.* 397 U.S. 1018, 25 L.Ed.2d 432, 90 S.Ct. 1230; *Taggart v. Weinacker's, Inc.* (1970) 397 U.S. 223, 25 L.Ed.2d 240, 90 S.Ct. 876; *Monks v. New Jersey* (1970) 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563; *Moon v. Maryland* (1970) 398 U.S. 319, 26 L.Ed.2d 262, 90 S.Ct. 1730; *Odom v. United States* (1970) 400 U.S. 23, 27 L.Ed.2d 122, 91 S.Ct. 112, *reh. den.* 400 U.S. 984, 27 L.Ed.2d 396, 91 S.Ct. 363; *Piccirillo v. New York* (1971) 400 U.S. 548, 27 L.Ed.2d 596, 91 S.Ct. 520; *Bostic v. United States* (1971) 402 U.S. 547, 29 L.Ed.2d 102, 91 S.Ct. 2174, *reh. den.* 404 U.S. 875, 30 L.Ed.2d 122, 92 S.Ct. 32; *McClanahan v. Morauer & Hartzell, Inc.* (1971) 404 U.S. 16, 30 L.Ed.2d 136, 92 S.Ct. 170; *Duncan v. Tennessee* (1972) 405 U.S. 127, 31 L.Ed.2d 86, 92 S.Ct. 785; *Iowa Beef Packers, Inc. v. Thompson* (1972) 405 U.S. 228; 31 L.Ed.2d 165, 92 S.Ct. 859; *Sarno v. Illinois Crime Investigating Com.* (1972) 406 U.S. 482, 32 L.Ed.2d 243, 92 S.Ct. 1677; *Murel v. Baltimore City Criminal Court* (1972) 407 U.S. 355, 32 L.Ed.2d 791, 92 S.Ct. 2091.

More recent cases include *Jones v. Hildebrant* (1977) 432 U.S. 183, 53 L.Ed.2d 209, 97 S.Ct. 2283; *Ramsey v. New York* (1979) 440 U.S. 444, 59 L.Ed.2d 440, 99 S.Ct. 1415.

volving around the fact that in the final analysis, there was no dispute justifying the attention of this Court.[6]

As stated by co-authors Robert L. Stern and Eugene Gressman:

> "After certiorari has been granted, it may become apparent to the Court upon oral argument and upon further study that the basis upon which review was permitted is in fact non-existent. 'Examination of a case on the merits, on oral argument, may bring into proper focus a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident.' *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184. As stated by Mr. Justice Frankfurter in *Armstrong v. Armstrong*, 350 U.S. 568, 572 '[A]fter a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the preliminary examination of the questions that were urged in the petition for certiorari. Due regard for the working of the certiorari system requires this. In view of the fact that about 1,300 applications were made last term for leave to be heard . . ., determination during this sifting process of the jurisdictional merits in all these 1,300 cases can hardly be expected. Theory and practice alike reject any such notion. The inevitable cursory consideration that is normally given in a case

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[6]In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (fn. 2) (1955), the Court set forth an extensive list of cases in which writs had been dismissed as improvidently granted up to the time of that decision. The list was followed by a statement of the court as follows: "Only in the light of argument on the merits did it become clear in these numerous cases that the petitions for certiorari should not have been granted. In some instances an asserted conflict turned out to be illusory; in others, a federal question was wanting or decision could be rested on a non-federal ground; in a number, it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance."

on the preliminary round precludes the assumption that a tentative finding of a federal question will survive the thorough study of the record which consideration of a case on the merits implies.' "[7]

A review of the specific question to be considered by this Court, taken in totality with the entire background of this case, and particularly the decision of the Court of Appeals below, indicates that certiorari herein may have been improvidently granted.

This Court has made it clear that it wishes to limit its consideration herein, leaving nearly all of the Third Circuit's decision, and specifically its choice of law analysis, to stand unassailed. That choice of law analysis is extensive and thorough (JA 140-156), and it is clear that the law of the United States will apply to determine the rights and liabilities of the parties in this matter.[8]

In determining whether or not certiorari has been improvidently granted, this Court has not reached a decision in past instances without a careful examination of the totality of the circumstances surrounding each particular case. *Bullock v. South Carolina*, 365 U.S. 292 (1961); *Atchley v. California*, 366 U.S. 207 (1961); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Murel v. Baltimore City Criminal*

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[7]Supreme Court Practice, Fifth Ed., 1978 §5.15, p. 369, *et seq.*

[8]Specifically, the Court below determined that under the choice of law rules of California (the transferor state with respect to Piper), the strict liability standard of Pennsylvania should apply to that defendant (JA 149), and under the governmental interests analysis approach of Pennsylvania (applied to Hartzell, since the case against it had not been transferred pursuant to 28 U.S.C. §1404(a)), the strict liability standard of the United States, as embodied in the laws of either Ohio or Pennsylvania, should be applied as to that defendant. (JA 152, 155). (The Court's attention is directed to footnote 95 of the Third Circuit's opinion (JA 155), in which the Court indicated that should Ohio law apply to Hartzell, rather than Pennsylvania law to both defendants, "[g]iving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.").

Court, 407 U.S. 355 (1972). In *Phillips v. New York*, 362 U.S. 456 (1960), the Court stated:

> "After hearing oral argument and fully examining the record . . ., we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here." 362 U.S. at 460. (See also *Baldonado v. California*, 366 U.S. 417 (1961), where the totality of circumstances disclosed failed to support the substantial due process issues tendered in the petitions for certiorari.).

Once the Court has had an opportunity to fully examine a matter before it, it has often in the past become convinced that the writ it had previously granted should be dismissed. In *Belcher v. Stengel*, 429 U.S. 118 (1976), the Court was faced with determining whether an off-duty policeman had acted under "color of law" in breaking up a barroom brawl. Full consideration of the record showed that this question was groundless since evidence already introduced below indicated that the question had already been independently determined on several occasions by several means. The Court stated:

> "Now that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered, we have concluded that the writ should be dismissed as improvidently granted."
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> 429 U.S. at 119-120.

Similarly, in *Smith v. Butler*, 366 U.S. 161 (1961), the Court held that "[a]fter full argument and due consideration, it became manifest that the course of the litigation and the decisions in the [state] courts did not turn on the issue on the basis of which certiorari was granted." 366 U.S. at 161. Accordingly, the writ was dismissed.

The case of *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), is also instructive. In that case, this Court determined the propriety of its hearing a question of intellectual interest, but entirely devoid of any pithy meaning within the context of the underlying case. The Court stated:

> "A federal question raised by a petition may be 'of substance' in the sense that, *abstractly considered*, it may present an intellectually interesting and solid problem. *But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.* (*Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 67 L.Ed. 922, 924, 43 S.Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, September 7, 1949, 69 S.Ct. v, vi; Address of Mr. Chief Justice Hughes before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313). *Special and important reasons imply a reach to a problem beyond the academic or the episodic.*"
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> 349 U.S. at 74. (Emphasis added).

Similarly, in *Burrell v. McCray*, 426 U.S. 471 (1975), Mr. Justice Stevens spoke for the Court:

> ". . . just as the Court's broad control of its discretionary docket includes the power to dismiss the writ because circumstances disclosed by a careful study of the record were not fully apprehended at the time the writ was granted, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 183, 3 L.Ed.2d 723, 79 S.Ct. 1115, so also, we should retain the power to take like action when our further study of the law disclosed that there is no need for an opinion of this Court on the questions presented by the petition. Even though I agree with Mr. Justice Brennan that the questions in this case are important, I am nevertheless persuaded that the state of the law applicable to the facts disclosed by this

record is sufficiently clear that the dismissal of the writ is a permissible exercise of the Court's discretionary power."

423 U.S. at 472-473.

Similarly, if the judgment below is clearly correct on another ground, decision of the question upon which certiorari was granted may prove unnecessary. *Belcher v. Stengel*, 429 U.S. 118 (1976); *S.S. Monrosa v. Carbon Black Export*, 359 U.S. 180 (1959). Respondent respectfully submits that this is the circumstance now facing the Court. Since the decision below rests on choice of law, an analysis and decision by this Court on the question of the degree of favorability of foreign law toward the plaintiff is unnecessary and would serve no purpose.

The purely academic nature of the question extant can also be seen to overlap onto the principle of mootness. This is a clear violation of the rule that there must be an actual live controversy extant at all stages of appellate or certiorari review. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Although there is such a controversy as between the parties hereto with respect to the final rights and liabilities of each of them, as for an actual, live controversy with respect to the particular issue before the Court, it is clear that none exists.

This Court has also decreed that the interest of the public in a question before it may not be enough to warrant attention. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial."

S.S. Monrosa v. Carbon Black Export, supra, 359 U.S. 180, 184 (1959).

Further, if the full record in a matter does not reflect an adequate presentation of the question upon which certiorari was granted, the writ will be dismissed as improvidently granted. *McClanahan v. Morauer & Hartzell,* 404 U.S. 16 (1971); *Tyrrell v. District of Columbia,* 243 U.S. 1 (1917). In the present case, it can be seen that the entire record has dealt in the main with the traditional *Gilbert* factors determinative of a forum non conveniens motion. More specifically, choice of law issues based upon various interest analysis approaches has consumed much of the time and attention of the courts below in this matter. The question presently before this Court is unique herein for its novelty, and since there is a patently adequate ground for the decision of the Court of Appeals, there is no need for the matter to be heard anew.

The case of *U.S. v. Rimer,* 220 U.S. 547 (1911), though not one of this Court's more recent decisions, is nonetheless instructive. In that case the Court dismissed the writ, holding that the record and oral argument did not actually require the Supreme Court to decide the question which it had expected to answer when it granted certiorari. The Court stated that the petitioner had conceded during argument that a closer scrutiny of the record made it exceedingly doubtful whether the action of the court below dealt with the principle which was deemed to have rendered necessary the granting of the writ of certiorari. In a like manner, the Court dismissed a writ as improvidently granted in *U.S. v. McFarland,* 275 U.S. 485 (1927), holding that the writ should be revoked because a decision in the case did not require a decision of the questions which were presented in the petition for certiorari. The Court exercised its discretionary

power to so revoke the writ pursuant to *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924).

Finally, in *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923), the Court said that although certiorari had been granted on the ground that the Courts of Appeals for two circuits were in conflict, careful examination revealed that such decisions were really in harmony and not in conflict, and that there was thus no ground for allowing the writ. Certiorari was also revoked in *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931), the Court holding that it appeared that the asserted conflict in decisions arose from differences in states of fact and not in the application of a principle of law.

These cases indicate that the present situation calls for revocation of the writs of certiorari. The decision of the Court of Appeals below leaves empty the question now extant. Whether or not a plaintiff might defeat a motion to dismiss on the ground of forum non conveniens because the law of an alternative forum is less favorable to her cause of action than the law of the forum hearing the motion is irrelevant by reason of the choice of law analysis of the Court of Appeals. In addition, any purported conflict between the Second and Third Circuits fails to take into account two factors: First, *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), cert. denied, 435 U.S. 904 (1978), held that the command in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), that a transfer pursuant to 28 U.S.C. §1404(a) not result in a change in the applicable law, was likewise applicable to a forum non conveniens dismissal (562 F.2d at 899). This holding still prevails and remains unrepudiated. Thus, all Circuits should, at the very least, take this decision into account when the facts before them so warrant. Second, the facts of an individual case cannot be considered in a vacuum with respect only to the law of the alternate

forum vis á vis the law of the forum hearing the matter. Rather, each of the *Gilbert* factors, juxtaposed with the facts of the particular case, must be considered before a determination one way or another can be reached.

Therefore, Respondent respectfully submits that when each of the cases in which there is an apparent conflict between Circuits is analyzed, it becomes manifest that in each instance the court acted correctly precisely because a balancing of *all* of the *Gilbert* factors indicated only one clear choice.

The assertions of Petitioners herein that the Court of Appeals based its entire decision on the favorability to the plaintiff of United States law and the unfavorability of the law of Scotland thereto, simply fail to take into account the massive balancing process in which the Third Circuit engaged before reaching its decision in this matter. Furthermore, that balancing process was justified, since it was clear to the Court that the District Court had abused its discretion in not holding the defendants to their proper burden. (JA 131, 156).[9]

The irrefutable fact of this matter is that the basis for the Court of Appeals' decision was choice of law. Thus, however this Court decides the singular question now before it, the result is the same: United States law as applied by the Circuit Court will govern this controversy. Further, because choice of law is such an important component of the doctrine of forum non conveniens, it is highly unlikely that the Dis-

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[9]See *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), in which the court stated: "'As this court concluded in *Founding Church of Scientology v. Verlag* (536 F.2d 429, 436 [D.C. Cir. 1976]): 'A trial judge has great but not unlimited discretion to apply the doctrine of forum non conveniens. Where there has been no weighing of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused.' " 637 F.2d at 783.

trict Court upon remand will refrain from accepting jurisdiction, in view of the fact that this country's law is to be applied, pursuant to the dictate of the Court of Appeals.[10] The writs of certiorari herein were, therefore, improvidently granted and should be revoked.[11]

II.

Important Considerations Support the Principle That the Plaintiff's Choice of a Forum Should Rarely Be Disturbed.

In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the Court set forth a threshold consideration to be weighed in determining the merits of a motion grounded upon the doctrine of forum non conveniens. The point was made at the very beginning of the Court's opinion, thereby lending to it the importance which in the Court's estimation it deserved. The language concerning the plaintiff's choice of a forum was as follows:

> "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of

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[10]In *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), the court first set forth the principle that where it is determined that foreign law applies, the United States court is free to retain or refuse jurisdiction. The court then said: "However, for similar forum non conveniens reasons, if United States law is applicable, the American court should retain jurisdiction rather than relegate the controversy to a foreign tribunal." 628 F.2d at 315. See also *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2nd Cir. 1959), cert. denied, 359 U.S. 1000 (1959); *Mattes v. National Hellenic American Line, S.A.*, 427 F.Supp. 619, 629 (S.D.N.Y. 1977).

[11]An instructive and comprehensive annotation on this subject is entitled "When Will Supreme Court Dismiss Writ of Certiorari as Improvidently Granted", Sheldon R. Shapiro, J.D., 30 L.Ed.2d 829.

courts, so that he may be quite sure of some place in which to pursue his remedy . . . It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 507-508.

With few variations,[12] this consideration, announced at the outset by the Supreme Court in *Gilbert*, remains paramount whenever courts consider a forum non conveniens issue.[13]

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[12]Petitioners have weakly attempted to argue that this consideration should be relegated to minor status when the real party in interest is not an American citizen. (Brief on the merits for Piper, p. 18, *et seq.*; Brief on the merits for Hartzell, p. 13, *et seq.*). However, as the Court of Appeals pointed out, "The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly less, when the plaintiff — more precisely, the real parties in interest — is foreign or when the forum chosen is not the plaintiff's home ground. *Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.*" (JA 129). (Emphasis added).

[13]*Lehman v. Napier*, 101 F.Supp. 313, 316-317 (D.C. Iowa 1951); *Collins v. American Automobile Ins. Co. of St. Louis, Mo.*, 128 F.Supp. 228, 230 (D.C.N.Y. 1955); *Molloy v. Bemis Bro. Bag Company*, 130 F.Supp. 265, 267 (D.C.N.Y. 1955); *Medich v. American Oil Company*, 177 F.Supp. 682, 683 (D.C. Pa. 1959); *Rogge v. Menard County Mutual Fire Ins. Co.*, 184 F.Supp. 289, 292 (D.C. Ill. 1960); *Zelman v. Bethlehem Steel Company*, 186 F.Supp. 246, 248 (D.C. Pa. 1960); *Vandusen v. J.C. Penney Co.*, 207 F.Supp. 529, 533, 534, 536 (D.C. Ark. 1962); *Daquila v. Schlosberg*, 253 F.2d 888, 889 (D.C. Cir. 1958); *Blue Bell, Inc. v. Jaymar-Ruby, Inc.*, 311 F.Supp. 942, 943-44 (D.C.N.Y. 1969); *Bartolacci v. Corp. of Presiding Bishop, Etc.*, 476 F.Supp. 381, 383 (D.C. Pa. 1979); *Burbank Intern. Ltd. v. Gulf Con. Intern., Inc.*, 441 F.Supp. 819, 822 (D.C. Tex. 1977); *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 453 F.Supp. 10, 11 (D.C.N.Y. 1978); *Mizokami Bros. of Arizona v. Mobay Chemical Corp.*, 483 F.Supp. 201, 206 (D.C. Mo. 1980); *Bolanos v. Gulf Oil Corp.*, 502 F.Supp. 689, 690 (W.D. Pa. 1980); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970); *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 312 (5th Cir. 1980); *Paper Operations Consultants International, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 671 (9th Cir. 1975); *Olympic Corporation v. Societe Generale*, 462 F.2d 376, 378 (2nd Cir. 1972); *Stevenson v. U.S.*, 197 F.Supp. 355, 358 (D.C. Tenn. 1961): "The right of a plaintiff to choose his forum, the law allowing an alternative, is recognized as a valuable right of choice which should not be disturbed in the absence of strong reasons therefor."

Indeed, the concept of the plaintiff being allowed his choice of location in bringing suit is fundamentally tied to the concepts of balancing and the burden on the defendant, both of which are inherent in the doctrine of forum non conveniens. In *Paper Operations Consultants International, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975), the Court reiterated the factors set forth in *Gilbert* which must always be considered, then stated:

> "The court in *Gulf Oil Corp.* cautioned that in considering these and other factors, the plaintiff's choice of forum should 'rarely be disturbed' unless the balance is strongly in favor of adjudicating the matter in another forum." 513 F.2d at 671.

Any restriction upon the plaintiff's original choice is to be arrived at only after this careful balancing process has been completed. *Gulf Oil Corp. v. Gilbert, supra*, 330 U.S. at 507-508; *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980). In *Schilling-Hillier S.A.I.E.C. v. Virginia-Car. Chem. Corp.*, 19 F.R.D. 271 (S.D.N.Y. 1956), the Court held:

> "In *Gulf Oil Corp. v. Gilbert*, . . . the Supreme Court declared that 'unless the balance [of convenience] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'. This was interpreted by the Court of Appeals for this circuit to mean that the defendant 'has the burden of making out a strong case for a transfer' which overweighs not only the convenience of the plaintiff but the right of the plaintiff to choose his forum. *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950)." 19 F.R.D. at 272.

Furthermore, if bringing the matter in another forum would merely shift the convenience from one party to the other, dismissal is not justified to overturn the plaintiff's original choice:

> "The facts of this case present what has been described as an 'equitable standoff'; both parties are likely to suffer roughly equal inconvenience. Under such circumstances, the transfer to another forum would merely shift the inconvenience from the defendants to the plaintiffs. Consequently, the plaintiffs' choice of forum should not be disturbed. (Citations omitted)." *Lieb v. American Pac. Intern., Inc.*, 489 F.Supp. 690, 697 (D.C. Pa. 1980).

In *Cheeseman v. Carey*, 485 F.Supp. 203 (D.C.N.Y. 1980), the court considered the plaintiff's right to choose a forum in connection with the dangers of forum shopping:

> "A court seeking reasons for choosing one or the other of these conflicting doctrines [i.e., deference accorded plaintiff's choice vs. forum shopping] is inevitably led to Mr. Justice Jackson's analysis of the doctrine of forum non conveniens in *Gulf Oil Corp. v. Gilbert* (citation omitted). Forum shopping is no more an evil than any other tactical determination a party makes in its behalf. Any competent lawyer chooses a forum with his or her client's interests in mind. This is undoubtedly why Justice Jackson made clear that a party had to do more than forum shop to justify invoking forum non conveniens; the choice of forum must have been made with some harassment in mind to have justified dismissal of the action." 485 F.Supp. at 215.

Finally, two other points have been made by the courts which presage the retention of litigation in the forum of the plaintiff's original choice. In *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980), the court held:

> "Finally, at least two miscellaneous considerations support the denial of defendant's motion. First, Delaware is the state in which two of the defendants are incorporated; an especially strong showing is required to support a forum non conveniens motion where plaintiff has ceded defendants the 'home turf' advantage.

> *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. at 453.[14] Second, a particularly strong showing of vexatiousness, harassment, or oppression is required where defendant's economic capabilities are disproportionately greater than plaintiff's. . . . *D'Angelo v. Petroleos Mericanos*, 398 F.Supp. 72, 84 (D. Del. 1975). On the basis of these considerations . . . it is apparent that plaintiff in this case should not be denied the forum of his choice." 85 F.R.D. at 673.[15]

It is clear from the above that the plaintiff's choice of a forum is to be accorded great weight as mandated by *Gilbert* and its progeny. However, beyond all of the traditional, irrefuted and irrefutable arguments for granting such weight to the plaintiff's selection, there is yet another, highly just and desirable benefit to be accomplished by this accord: A defendant, be it individual or business entity, will in this way be held to the highest possible standard of accountability for his purported wrongdoing.

Like many American companies, the defendant manufacturers herein disseminate their products on a world-wide basis.[16] To allow such defendants to use the forum non

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[14]The fact that plaintiff had already ceded this advantage once, because of the previous motions of defendants in California, was not lost on the Court of Appeals, which held that the previous transfer served to add to the defendants' burden on the present motion. (JA 120-124).

[15]It is apparent that both of these factors are applicable in the case extant. Piper Aircraft Corp. is a Pennsylvania corporation, while Hartzell Propeller, Inc. is an Ohio corporation. (JA 119). Further, it goes without saying that their economic capabilities far exceed those of the nearly destitute Scottish heirs who are the real parties in interest.

[16]As stated by C.O. Miller in his article entitled "Aviation Accident Investigation: Functional and Legal Perspectives", *Journal of Air Law and Commerce*, Vol. 46, 1981, p. 283: "The interest of the United States in [foreign accidents] is extensive because of its citizens' predominance in the manufacture of aircraft used throughout the world. Ninety to ninety-five percent of the free world's air carrier aircraft bear the labels of American companies as do about eighty percent of the free world's general aviation aircraft. Furthermore, United States carriers and aviation corporations operate in all corners of the globe."

conveniens vehicle to override the plaintiff's choice of a forum is to allow them to escape their responsibility for competent and careful manufacturing practices. In the present instance, the defendants are seeking to hide behind the fact of the real parties' in interest foreign citizenship to obviate their responsibilities as perpetrators of defective products which lead to injury and death, and further to obviate the fact that recompense is due and owing, no matter where the plaintiffs reside.

Respondent does not attempt to hide the fact that her prospective recovery in the courts of the United States is much greater than in those of Scotland. It is openly conceded that the choice of a United States forum was made precisely because the jurisdictions in this country allow the cause of action for strict liability for manufacture of defective products and the cause of action for wrongful death while in Scotland, the sole basis upon which an aggrieved plaintiff can recover in a case such as this is a survival action based on negligence. The principles of strict liability accepted by courts in the United States are not so accepted under Scottish law.[17]

While it may be true that a plaintiff will always seek the forum with the most favorable law, it is clear that within that concept of what is "favorable" is included a standard or standards of conduct such that a defendant will be held more highly accountable therein than he would be in a supposedly "unfavorable" forum. Thus, to advance the plaintiff's choice is to advance a highly desirable objective and public policy.

Defendant-manufacturers, then, are eager to avoid being held answerable for wrongdoing in American courts apply-

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[17]Scotland Law Digest: Death; Martindale-Hubbell Law Directory, Vol. VIII, 1981, p. 4101.

ing American law. The reason is obvious. Monetary judgments tend to be considerably higher under the laws of courts in the United States than in other forums. To force the present plaintiff, as well as other similarly situated plaintiffs, into a foreign jurisdiction will preclude her from bringing causes of action to which she is rightfully entitled. It can only be concluded that Petitioners desire to have this matter heard in such a jurisdiction precisely because of the limitation on applicable causes of action, as well as the unavoidable fact that Petitioners stand to have a larger monetary judgment entered against them here.

The result, then, is a "two-way street". Sacrifice the plaintiff's choice of a forum and we sacrifice the high standard to which a defendant might prospectively be held. Maintain the weight long accorded the plaintiff's choice, and we simultaneously maintain higher standards which manufacturers and other disseminators of products must meet.[18] The latter, obviously, is the more favorable alternative.

The Court below concluded that the defendants had not met their burden in demonstrating that the balance of equities and the balance of the other *Gilbert* factors should swing in their direction. In reaching that conclusion, it gave the proper weight to the plaintiff's choice of forum, juxtaposing alongside that choice the other relevant factors as outlined by the Court in *Gilbert* and its offspring. The outcome was that the plaintiff's choice was not inconvenient, and that her selection of a forum should stand. Respondent respectfully submits that the court acted correctly in weighing each of

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[18]This, of course, is the concept of deterrence of wrongful conduct. [*Ryan v. Clark Equipment Co.*, 268 Cal.App.2d 679, 74 Cal.Rptr. 329 (1969); *Hurtado v. Superior Court*, 11 Cal.3d 574, 522 P.2d 666 (1974)]. In its choice of law analysis, the Court of Appeals dealt substantially with this concept (JA 147-149), reaching the conclusion that Scotland would have absolutely no interest in applying its own law to this matter, since it domiciled neither of the allegedly wrongdoing manufacturers.

the applicable factors and in according the plaintiff's choice its proper value and significance.[19]

III.

The Requirement That an Alternative Forum Be Available to Plaintiff Under the Doctrine of Forum Non Conveniens Includes a Remedy and Law Which Are Acceptable and Adequate.

Along with setting forth the importance of the plaintiff's choice of a forum, and indeed even prior thereto, the Supreme Court in *Gulf Oil Corp. v. Gilbert, supra,* stated that the doctrine of forum non conveniens absolutely requires the availability of an alternative forum in which an aggrieved plaintiff might seek his remedy, before a motion grounded upon the doctrine could be granted. The court set forth the relevant language in this regard as follows:

> "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." 330 U.S. at 506-507.

This requirement has been carefully heeded so that when a plaintiff, truly wronged, has nonetheless chosen an inconvenient site for litigation, he may still be assured of his day in court — somewhere. (*DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977); *Calavo Growers of California v. Belgium*, 632 F.2d 963, 968 (2d Cir. 1980); *Fosen v. UTC*, 484 F.Supp. 490, 503 (D.C.N.Y. 1980).)

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[19]Granting the plaintiff's choice the weight properly due it does not seem to result in a burgeoning amount of litigation foisted upon the American judicial system. Indeed, the concern of the *Gilbert* court was apparently that American courts might too often eschew jurisdiction, a fear which it at one and the same time announced and put to rest: "The doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." 330 U.S. at 508.

In *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666 (D.C. Del. 1980), the court made clear the importance of this principle:

> "Under no circumstances, however, according to Gilbert and subsequent cases, may a court dismiss an action under the doctrine of forum non conveniens unless an adequate alternative forum exists. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 506-507. See also *North Branch Products, Inc. v. Fisher*, 109 U.S. App. D.C. 182, 284 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 827, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961); *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S.D. N.Y. 1972); *J.F. Pritchard & Co. v. Dow Chemical of Canada, Ltd.*, 331 F.Supp. 1215 (W.D. Mo. 1971), *aff'd* 462 F.2d 998 (8th Cir. 1972)." 85 F.R.D. at 670.

Further, demonstration of the existence of an alternative forum is part of the defendant's general forum non conveniens burden. *Fosen v. UTC, supra*, at p. 503; *Schertenleib v. Traum*, 589 F.2d 1156, 1160 (2d Cir. 1978).

The Court in *Gilbert* did not elaborate on the concept of an alternative forum, so as to make clear what constituted an acceptable alternative. However, several courts have since come to the conclusion that included therein of necessity are an adequate remedy and law, so that forcing plaintiff out of the forum originally chosen will not completely deprive him of the rights and advantages he sought there.

In *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D.C. Del. 1978), the court dealt at length with the *Gilbert* mandate requiring an alternative forum, and the ramifications thereof, speaking as follows:

> " 'A prerequisite to dismissal under the doctrine of forum non conveniens is the existence of an alternative forum where plaintiff can litigate his claims.' *Wan v. Avis Rent A Car System, Inc.*, No. 75-28 (D. Del. Jan.

20, 1976) (Memorandum Opinion) (footnote omitted). '[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff.' Restatement (Second) of Conflict of Laws §84, Comment c (1971). 'That there is an alternative forum that will take jurisdiction of the case *and where plaintiff can get the relief he would get in the federal court must clearly appear before dismissal can be ordered.*' C. Wright, Law of Federal Courts 186 n. 23 (1976). *'Limitation upon or denial of recovery is in and of itself grounds for not dismissing on forum non conveniens grounds.' Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 458 (2d Cir. 1975) (Oakes J., dissenting), *cert. denied*, 423 U.S. 641 (1976).

"That the Third Circuit Court of Appeals believes the existence of a suitable alternative forum to be critical is boldly demonstrated in this passage from *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945, 87 S.Ct. 318, 17 L.Ed.2d 225 (1966):

> 'The issue of convenience aside, the more important question is whether the relinquishment of jurisdiction would best serve the ends of justice. The court below seemed to think that it would, but with this we cannot agree. There is no evidence in the record that the retention of jurisdiction would seriously prejudice [defendant]. *However, the relinquishment of jurisdiction could result in serious detriment to [plaintiffs'] causes of action.* It would relegate the libelants to a foreign forum in which the procedural remedies are far less conducive to the fair administration of justice than those available under our admiralty rules. . . .'

"Thus the Third Circuit has apparently endorsed the concept that not only must an alternative forum exist, *and not only must that forum provide relief for the actions alleged to violate United States law*, but the

> alternate forum must also provide comparable procedural protections to those in the United States. This Court needs not hold as much. Sufficient doubt arises with respect to the existence of an alternative forum and *the availability of relief for the alleged actions* to justify a decision not to dismiss the case without resort to a comparison of alternative procedural safeguards."
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> 78 F.R.D. at 455. (Emphasis added).[20]

The court went on to discuss factual considerations with respect to the particular circumstances then before it, and stated:

> "Finally, even if an Ecuadorian tribunal will hear the case, jurisdiction is had over all defendants, and plaintiff financially is able to proceed in Ecuador, it appears that no generally codified Ecuadorian legal remedy exists for unjust enrichment or the tort claims asserted here."
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> 78 F.R.D. at 456.

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[20]It should be noted that not only does Scotland severely limit the causes of action available to a plaintiff, but its procedural safeguards are also stringently circumscribed when compared to United States discovery procedures. In preparation for the hearing of this case before the Court of Appeals, counsel for then-Appellant Reyno spoke telephonically with Scottish attorney Michael J. R. Simpson, of Tods, Murray & Jamieson in Edinburgh. He informed us that Scottish courts do not recognize interrogatories as we know them in the United States. Only if a witness is unable to attend the trial of the matter is counsel allowed to submit questions in written form, somewhat akin to interrogatories, to that witness, and then only at such a late date as to be immediately prior to trial. Counsel is thereby unable to gather any information, study it and determine its usefulness and validity until such time as to be severely handicapped in the review of such material. With respect to documents held by non-parties in the case, they may be obtained only if shown relevant and then only in the event a court order is obtained, certifying that good cause exists therefor. Again, counsel may be seen to be extremely limited in the free flow and exchange of vital discovery material, a limitation which he is not required to suffer in the United States, where discovery procedures are liberal and far more elastic. It may be seen, therefore, that Petitioners and Respondent alike will suffer from the rigorous controls imposed on discovery if this matter is brought to trial in Scotland.

Such is the situation here. Since Scotland recognizes no causes of action for wrongful death and strict products liability, it is evident that defendants' assertions that that country presents an acceptable alternative forum are unfounded. To force Respondent into the courts there would do more than deny her a higher monetary recovery; such a move would be tantamount to the denial of basic rights which exist here in the United States. There is, therefore, no acceptable alternative forum as mandated by *Gilbert*.

The *Phoenix* court went on to consider and reject the applicability of *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), *cert. denied*, 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed.2d 76 (1956). In *Vanity Mills*, a dismissal based on forum non conveniens was granted. The Canadian justice system had already rendered certain decisions concerning the trademarks in issue and it was not disputed that plaintiff could obtain fair adjudication in Canada. The Second Circuit examined relevant Canadian law to assure existence of a legal remedy. The *Vanity Mills* Court stated:

> "Were this merely a transitory tort action in which disputed facts could be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. But we do not think it the province of United States district courts to determine the validity of trade-marks which officials of foreign countries have seen fit to grant."
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> 234 F.2d at 647.

In concluding, the *Phoenix* court determined that the United States forum should retain jurisdiction:

> "In the case at bar, there is (1) an alleged connected tort action that can be litigated here; and (2) the absence of a clear issue under a developed body of foreign law hinging upon a previous determination under that foreign law. For these reasons, *Vanity Mills* is not dispositive of this action."
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> 78 F.R.D. at 457.

These cases clearly indicate that the existence of an alternative forum, the sine qua non set forth in *Gilbert*, is not simply an abstract concept. Rather, before another jurisdiction can be considered as a possibly acceptable alternative, the defendant moving for dismissal based upon forum non conveniens must demonstrate that an adequate remedy and law are available in the second forum, so that plaintiff might enjoy substantially the same rights and prospects for recovery as he would have in the original court. In other words, as set down by the Third Circuit in *DeMateos v. Texaco, supra*, even a forum non conveniens dismissal must result only in a change of courts, and not also in a change of law, rights and liabilities. (562 F.2d at 899). See also *Chirinos de Marin (Alvarez) v. Creole Petroleum Corp.*, 613 F.2d 1240 (3d Cir. 1980).

Both Petitioners herein have relied on *Dahl v. United Technologies Corp.*, 472 F.Supp. 696 (D.C. Del. 1979),[21] urging that the facts therein are so substantially similar to those of the case now at bar that the Third Circuit should have followed the example of the *Dahl* court in dismissing on the ground that the foreign forum is far more suitable for the trial of this matter. Petitioners' reliance is misplaced.

The *Dahl* case involved the crash of a Norwegian owned and operated helicopter in Norwegian waters. The four Norwegian nationals aboard were killed. Acting upon a motion based upon forum non conveniens, the American court, prior to turning to the merits of the motion, considered the applicability of *Phoenix Canada Oil Co. v. Texaco, Inc., supra*, but rejected the holding therein. Precisely because an almost identical remedy was permitted under Norwegian law, the court concluded that Norway presented an acceptable alternative forum, and went on to dismiss the

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[21]Brief for Petitioner Hartzell, pp. 11, 12, 17, 30, 34; Brief for Petitioner Piper, p. 30.

matter because of this and other traditional forum non conveniens factors. The court's language is of crucial importance in the case now under consideration:

> ". . . the plaintiffs argue that Norway is not an acceptable alternative forum because there is no evidence that it will afford them *remedies* or procedural protections comparable to those available in the United States. The record, however, refutes that argument. UTC has filed an affidavit by a Norwegian attorney which indicates that . . . under Norwegian law UTC would be subject to *unlimited liability* for injuries and damages resulting from the helicopter crash shown to have been caused by its negligence. The affidavit also states: 'Norway is in the process of developing case law built up around product liability cases' . . . Accordingly, the Court finds that Norway is a suitable alternative forum and turns to the merits of the defendant's motion." 472 F.Supp. at 699. (Emphasis added).

See also *Fosen v. United Technologies Corp.*, 484 F.Supp. 490, 504 (S.D.N.Y. 1980).

That the *Dahl* court gave primary consideration to the suitability of the proposed alternative before turning to the motion on the merits is significant. As did the court in *Gilbert*, the *Dahl* court realized that such a question is of threshold importance, and that a determination in this respect must be made before the court can go on to the other *Gilbert* factors. Should the alternative forum not be found suitable, the case must remain in the original court. *Fosen v. United Technologies Corp., supra*, 484 F.Supp. 490 (S.D.N.Y. 1980).

In the present case, it is clear that plaintiff will suffer great prejudice of her right to bring certain causes of action if this matter is forced to trial in Scotland. Unable to prosecute causes of action for wrongful death and strict products

liability, and limited solely to proving negligence, she will be denied fundamental rights granted her under American law. On this basis alone, all considerations of the amount of any possible recovery aside, it is obvious that Scotland does not rise to the status of an acceptable alternative forum. Even before any of the merits of the Petitioners' arguments are heard, it is impossible for them to successfully proceed past the threshold directive of this Court in its decision in *Gulf Oil Corp. v. Gilbert* that such an alternative be found. For this reason, this matter must, under any notions of justice and fairness, proceed in the courts of the United States.

Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the decision and order of the Court of Appeals for the Third Circuit were correct, and that this matter should be remanded to the United States District Court for the Middle District of Pennsylvania for trial.

Dated: July 10, 1981.

Respectfully submitted,

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